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No. 10-876

IN THE

Supreme Court of the United States

JUNE O. CARLSON,

Petitioner,

v.

SCOTT BUKOVIC AND CITY OF DARIEN, ILLINOIS, AN ILLINOIS MUNICIPAL CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether this Court's ruling in the case of *Ortiz v. Jackson*, Supreme Court No. 09-737 (decided January 24, 2011) is determinative.

2. Whether Petitioner June Carlson misstates the record when describing the Seventh Circuit Court of Appeals' ruling. The Seventh Circuit, reviewing the claim *de novo*, ruled her Fourth Amendment excessive force claim was submitted correctly to the jury under *Graham v. Connor*, 490 U.S. 386 (1989) standards.

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STATEMENT

Plaintiff June Carlson filed a complaint for violation of her Fourth Amendment rights pursuant to 42 U.S.C. 1983. Count I was titled "Unreasonable Seizure in the Nature of Assault and Battery." (*Petition for Writ of Certiorari (Hereinafter "Petition"), p. 11; 41a).* This count alleged respondent Scott Bukovic had used "unnecessary force" in committing an "unreasonable seizure" of Carlson's person.

Count I put Bukovic on notice that he was defending himself against a claim of excessive force. (*Petition, p. 6a).* Carlson avowed she was not bringing a claim for false arrest under the Fourth Amendment. (*Petition, p. 6a).* Bukovic defended himself at all times in the trial court under this Court's guidance in *Graham v. Connor,* 490 U.S. 386 (1989). (*See Also, Petition, pp. 48a-50a).* He asserted qualified immunity as a defense and, at the appropriate time, filed a motion seeking summary judgment based upon qualified immunity. *(Petition, pp. 48a-50a).*

Carlson filed her own motion for summary judgment on Count I and sought an order declaring liability on the theory that Bukovic had used "per se unreasonable force" against her. (*Petition, pp. 12a-13a).* The trial court found that, under this Court's ruling in *Graham v. Connor,* 490 U.S. 386 (1989), and similar cases, a fact issue precluded summary judgment on all the individual parties' summary judgment motions and held a trial on plaintiff's Fourth Amendment excessive force claim. (*Petition, pp. 43a-47a).* The trial court granted summary judgment on the City of Darien's motion. (*Petition p. 60a).*

The jury returned a special interrogatory for Bukovic, finding that no seizure had occurred. (*Petition p. 12a*). The trial court entered judgment in his favor. (*Petition, Appendix D, p. 78a*).

Carlson appealed the final judgment as well as the adverse summary judgment ruling. The Seventh Circuit Court of Appeals heard Carlson's arguments and affirmed the trial court's entry of judgment on all counts in favor of Bukovic. (*Petition, Appendix A, pp. 26a-27a).* In doing so, the Seventh Circuit examined at length Carlson's argument that summary judgment should have been entered in her favor. (*Petition, pp. 12a-23a).* The Seventh Circuit viewed the facts in the light most favorable to Bukovic and affirmed the decision to send Carlson's Fourth Amendment excessive force claim to the jury. (*Petition, p. 19a*).

The Seventh Circuit's affirmation of the denial of Carlson's summary judgment is the only ruling petitioner seeks review. (*Petition, p. 32).* Carlson has asked this Court for *certiorari* in order to remand the case to the trial court for "further consideration" of her Count I. (*Petition, p. 32*).

SUMMARY OF THE ARGUMENT

1. This Court's January 24, 2011 ruling in *Ortiz v. Jackson*, Supreme Court No. 09-737 (decided January 24, 2011) ends petitioner's case. Petitioner's appeal of the denial of her summary judgment motion after there has been a trial is no longer possible, given the ruling in *Ortiz*.

2. Carlson misstates the record regarding the Seventh Circuit's ruling on her "per se unreasonable" theory of liability. The Seventh Circuit, reviewing the claim *de novo,* ruled that the trial court was correct to submit the Fourth Amendment excessive force claim to the jury. Carlson's formulations of the law misstate Fourth Amendment principles.

ARGUMENT

1. This Court's Decision In *Ortiz v. Jackson* Decides Carlson's Petition Against Her

The Court issued its opinion in the *Ortiz v. Jackson,* Supreme Court No. 09-737 (decided January 24, 2011) case after Carlson filed her petition for *certiorari.* In *Ortiz,* the issue was whether an adverse summary judgment ruling was appealable after a trial was held. On January 24, 2011, this Court ruled that such an appeal was prohibited.

a. *Ortiz v. Jackson*

As this Court is well aware, the *Ortiz* case was a civil rights case (pursuant to 42 U.S.C. 1983) where the trial court denied the police officer defendants' motion for summary judgment. The officers had claimed qualified immunity. The trial court found that there were genuine issues of material fact that precluded a grant of qualified immunity, and the officers did not take an interlocutory appeal. The jury returned a verdict against the officer defendants and judgment was entered against them. The defendants failed to move the trial court for judgment as a matter of law under Rule 50(b).

Instead, on appeal to the Sixth Circuit Court of Appeals, the officers argued that they should be granted qualified immunity. The Sixth Circuit analyzed their claims and decided that, yes, qualified immunity should be granted. The Sixth Circuit directed judgment to be entered in favor of the defendants.

This Court, on January 24, 2011, ruled that the qualified immunity grant by the court of appeals was improper. The Court ruled that the officers' motion for summary judgment was not procedurally proper before the appellate court. The officers had foregone their right to review of the trial court's qualified immunity decision by not pursuing an interlocutory appeal. At a minimum, the officers, post-verdict, should have sought Rule 50(b) relief if they wanted to preserve the issues of judgment as a matter of law for appellate review.

This Court's ruling on January 24, 2011 ends the circuit conflict as to whether a party can appeal a summary judgment ruling after a full trial on the merits has been held. The answer is no.

b. *Ortiz v. Jackson* As Applied To the Petition Here

The *Ortiz* decision resolves Carlson's petition for *certiorari* against her. The appeal of a summary judgment order after a full trial on the merits is held is no longer available after *Ortiz*. Here, the district court denied Carlson's motion for summary judgment on her claim that there was a "per se" unreasonable seizure. Carlson did not seek Rule 50(b) relief after the verdict was rendered against her. There is no longer an opportunity for her

to seek relief on appeal of the denial of her summary judgment motion.

The fact that the *Ortiz* case dealt with a defendant's qualified immunity request at summary judgment does not save Carlson's claim. The Court was clear in its January 24, 2011 decision that the rule is that a party may no longer appeal a summary judgment motion after a trial on the merits is held. This Court gave no exceptions to the rule and none are warranted in Carlson's case.

The *Ortiz v. Jackson* case that Carlson relies on in her petition for *certiorari* is determinative of her request. This Court determined in *Ortiz* that the petitioner's request for *certiorari* should be denied.

2. Carlson's Petition Misstates the Seventh Circuit's Ruling

Assuming this Court finds an exception to the *Ortiz v. Jackson* case and considers the substance of petitioner's argument, the petition should not be granted. The misstatement of what the Seventh Circuit actually ruled as opposed to what is argued in the petition is significant. Once the misstatements are corrected, the Seventh Circuit's opinion is legally correct and there is no need to grant Carlson's petition.

a. Petitioner Received *De Novo* Review

Petitioner crucially misstates the record on the important issue of exactly what the Seventh Circuit did and did not rule. Petitioner claims that she was entitled to *de novo* review of her appeal of the summary judgment

ruling, but did not receive it. (*Petition, p. 16*). According to petitioner, the Seventh Circuit's failure to grant her *de novo* review is reversible error. The assertion by petitioner that she did not receive *de novo* review is incorrect. The Seventh Circuit examined her motion for summary judgment under the *de novo* standard. The Seventh Circuit merely agreed that the trial court was correct that factual issues precluded the grant of summary judgment and a trial on the merits was proper.

As evidence of the misstatement by the petitioner, the opinion of the Seventh Circuit is the key. In beginning its analysis of the question presented by Carlson, the appellate court wrote that it "understood" that Carlson's arguments were limited to the denial of her summary judgment motion. (*Petition p. 12a-13a, fn.* 13). The Seventh Circuit noted that any claims regarding the sufficiency of the evidence were waived once Carlson did not file a Rule 50 motion. This initial statement clearly shows that the Seventh Circuit was examining her claim as a matter of law. Then, after a lengthy and thorough analysis of the relevant Fourth Amendment principles, the Seventh Circuit wrote: "We conclude, accordingly, that the district court correctly submitted the matter to the jury." (*Petition, p.* 19a). The Seventh Circuit was without question analyzing her claim under *de novo* review.

Because petitioner misstates what type of review the Seventh Circuit gave her claim, her petition should be denied.

b. The Petitioner's Formulations of the Law Are Incorrect

Petitioner is left trying to advance in this Court her twice-rejected argument about what she actually alleged in her Count I. (*Petition p. 19a-23a; 43a-50a*). It is apparent that petitioner misunderstands the nature of the Fourth Amendment excessive force claim she alleged and the reason why the jury ruled as it did.

Petitioner asserts she framed her Count I as "an iteration" of Fourth Amendment excessive force claims that would require a lower burden of proof. (*Petition p. 21*). She also asserts that the Seventh Circuit recognized her "iteration" in its opinion. (*Petition, pp. 20-21*). Her theory of a "per se unreasonable force" simply misstates Fourth Amendment claims of excessive force as announced by this Court. Petitioner additionally misstates what the Seventh Circuit ruled in its opinion.

This Court has clearly established the elements of a Fourth Amendment excessive force claim. In *Graham v. Connor*, 490 U.S. 386 (1989) this Court required that there be (a) a seizure and (b) objectively unreasonable force used for a violation of Sec. 1983 under the Fourth Amendment. This Court has revisited the *Graham v. Connor* standard but never departed from the requirement that the seizure element and the objective unreasonableness element be proven by a plaintiff separately and distinctly. *See, Scott v. Harris*, 550 U.S. 372 (2007); *County of Sacramento v. Lewis*, 523 U.S. 833 (1998); *California v. Hodari D.*, 499 U.S. 621 (1991).

Petitioner maintains, despite the body of law from this Court and the courts of appeal, that her alleged claim for "per se unreasonable seizure" falls under the rubric of a Fourth Amendment excessive force claim. *Petition pp. 19-21.* It seems that petitioner is seeking to have this Court abandon the second half of the analysis of *Graham v. Connor* in Fourth Amendment excessive force cases. Petitioner simply fails to understand the implication of her pleading a Fourth Amendment excessive force claim and her admitted failure to plead a Fourth Amendment false arrest claim.

The district court understood that petitioner's Fourth Amendment excessive force claim was governed by *Graham v. Connor.* (*Petition, pp. 43a-50a*). The Seventh Circuit affirmed the district court's summary judgment rulings and jury instructions under *Graham v. Connor.* (*Petition pp. 12a-23a*). In particular, the appellate court directly addressed the petitioner's misstatement and misunderstanding of Fourth Amendment excessive force claims (versus Fourth Amendment false arrest claims) in its opinion at Footnote 19. (*Petition, pp. 21a-22a, fn. 19*). In that footnote, the appellate court explained that the analysis of a seizure in a false arrest case will focus on "unreasonableness," but the proper inquiry of what is unreasonable in an excessive force case will turn on the "totality of the circumstances" as governed by *Graham v. Connor.* (*Petition p. 21a-22a, Fn. 19*)("A seizure without probable cause is conceptually different from a seizure that employs excessive force; both are unreasonable, but for different reasons").

Despite this clear statement of the law governing "reasonableness" in the Fourth Amendment excessive

force context, petitioner insists that her "iteration" of "per se unreasonableness" is a valid cause of action. To the contrary, and as the Seventh Circuit quoted petitioner's counsel, the formulation of this purported claim would render an officer constantly liable for any touching of an individual that was not arrested "no matter how brief" if the officer did not have probable cause to arrest the individual. *Petition, p. 13a (quoting Carlson's counsel).* This is simply not a correct statement of law. *See, Petition p. 21-22 fn. 19 (dismissing the theory).*

The Seventh Circuit discussed the appropriate use of force by an officer on a non-arrestee in its opinion. It is a complicated issue and, in this case, one resolved by the jury. But the Seventh Circuit is correct when it wrote that:

> We must remember that police officers find themselves in a myriad of contentious, and potentially explosive, situations where in an effort to defuse the situation, a combination of verbal declarations and gestures must be employed. When considered in context, such actions may be more exhortatory than commanding in nature.

Petition, p. 19a.

This common-sense statement is torn apart under petitioner's "per se unreasonable" theory of excessive force. Petitioner wants this Court to adopt a rule whereby no officer could use any force on a non-arrestee (unless, later, a determination of probable cause is made). (*Petition p. 19*). This simply is not the law of the Fourth Amendment as declared by this Court, nor should it

be. Because petitioner misstates the law governing Fourth Amendment excessive force claims and gives no compelling reason why such a drastic change in the law is warranted, the petition should be denied.

CONCLUSION

Petitioner's request for a writ of *certiorari* should be denied. This Court's decision in *Ortiz v. Jackson* forecloses review. If the Court decides that the matter is not foreclosed by *Ortiz v. Jackson*, the petition should be denied for the remaining reasons set forth herein.

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